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SUBJECT: LEGAL ADVISER'S DISCUSSIONS WITH THE EUROPEAN COURT OF HUMAN
RIGHTS PRESIDENT

REF: STRASBOURG 12

Sensitive but Unclassified - Please Protect Accordingly.

¶1. (SBU) SUMMARY: Legal Adviser Harold Koh and European Court of Human Rights President Jean-Paul Costa supported increased contact between the U.S. and the Court during a meeting in Strasbourg September 11, with Costa noting that both face many of the same challenges. Koh outlined increased U.S. engagement with human rights fora, with Costa and his staff describing the challenges of an ever increasing and often politicized case load. Incoming Council of Europe Chair Switzerland will host a conference February 18-19 in Interlaken to discuss the court's future over the next decade. Representatives from L and possibly DRL may be invited to attend. Costa was accompanied by Polish Judge Lech Garlicki, Deputy Registrar Michael O'Boyle, and Deputy Chief of Staff John Darcy. Koh was accompanied by Consul General. End summary

¶2. (SBU) Costa and Koh agreed on the usefulness of increased contacts, with Koh noting the context of U.S. engagement with the Human Rights Council and other international human rights fora. Costa underscored that the U.S. and the Court face many of the same challenges, including finding a balance between the fight against terrorism and the protection of freedom. Both also agreed on the efficacy of the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI - whose September 10-11 sessions Koh attended), with Costa and Darcy stressing how CAHDI had provided a clear legal opinion supporting Protocol 14bis (reftel), thereby sidestepping Russian reluctance to ratify Protocol 14 and streamlining some of the Court's procedures.

¶3. (SBU) In Costa's view, the court has had an increased impact on the legal systems of member states. That said, he acknowledged the need for greater implementation by member states of the European Convention on Human Rights. In one sense, Costa observed, the court is a victim of its own success, with an ever increasing number of applications leading to the current backlog of 100,000 cases. The court, Costa and his colleagues underscored, cannot sustain this trend. Given the pace of applications, the court would have 300,000 cases by ¶2020.

¶4. (SBU) Garlicki said there are potential ways to reduce the caseload. One would be the transformation of the court into a constitutional court that could determine which cases it would accept. Costa cited the example of the European Court of Justice with its separate Court of First Instance as another way to filter cases. Assistant Registrar O'Boyle cautioned that the court should not destroy the perception that it is open to individual citizens. Perhaps, he added, the court could adopt an advisory opinion system or require similar cases to be grouped under a petition system.

¶5. (SBU) Costa noted another problem - political pressures from some countries (Russia, Turkey, Ukraine, and others with high per capita numbers of cases) on the court. In addition, the court faces pressures on various cases dealing with inter- and intra-state conflicts. He observed that Georgia has brought two cases against Russia (the first dating from the expulsion of

1,500 ethnic Georgians from Russia a few years ago, the second dating from the August 2008 conflict). Costa explained that, given all these challenges, the upcoming COE Chair, Switzerland, will sponsor a conference in Interlaken February 18-19 to discuss how the court will function over the next decade.

¶6. (SBU) A separate meeting with Court Vice President Nicolas Bratza (UK) September 11 echoed many of the themes raised in the Costa meeting. Bratza lamented the increasing criticism of the court by national judges. According to Bratza, some national judges perceive an increased willingness by the court to overrule national court decisions, particularly regarding Article Eight (right to respect for private and family life) and Article Ten (freedom of expression) of the European Convention. Likewise, some perceive an uneven record of the court in respecting precedent.

¶7. (U) Legal Adviser Koh has cleared this message.

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